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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD LANCE FRITCHEY,

Defendant and Appellant.

C040975

(Super. Ct. No.
CM016120)

Defendant Ronald Lance Fritchey pleaded no contest to continuous sexual abuse (Pen. Code, § 288.5, subd. (a)) and committing a forcible lewd act on a child under age 14 (Pen. Code, § 288, subd. (b)(1)). The trial court imposed the middle term of 12 years for continuous sexual abuse and a full consecutive upper term of eight years for the forcible lewd act, for an aggregate sentence of 20 years.

On appeal, defendant claims the trial erred by imposing full consecutive sentences. We shall affirm the judgment.

FACTS

A. The Underlying Offenses

Defendant lived with his girlfriend and her children, including the young girl that was the victim in this case. The victim reported that defendant repeatedly molested her from the time she was seven or eight years old until she was 11 and reported the abuse.¹ On numerous occasions, defendant touched her vaginal area with his fingers and mouth and rubbed his penis against her vagina. Defendant had her orally copulate him approximately 20 times. Defendant partially inserted his penis in her "bottom" on one occasion and it hurt and she told him to stop.

In an interview with an investigator, defendant admitted sexually abusing the victim over the course of two years, from the time she was nine years old. The abuse was sporadic at first but became more frequent. Defendant admitted having the victim orally copulate him approximately 30 times, orally copulating her approximately 20 times, touching her vaginal area with his hands approximately 10 times, rubbing his penis against her vagina approximately 10 times, and rubbing his penis against her buttock(s) approximately 10 times. Defendant denied any anal penetration of the victim, although he admitted rubbing his

¹ The factual summary is taken from the probation officer's report.

penis against the "crack" of her buttocks on a couple occasions. He admitted ejaculating every time he molested the victim.

Some of the sexual abuse involved force or the threat of force. For example, the victim reported that defendant grabbed her hand and made her rub his penis after she said she did not want to do it. One time, defendant placed his penis in her mouth but she gagged and tried to pull away. Defendant grabbed her shoulders and said, "Don't make me force you." He threatened to insert his penis in her "bottom" if she did not allow him to "finish." Defendant told the investigator that when he had the victim orally copulate him, he would keep her from pulling away by holding his hand on her head. He admitted he sometimes continued to molest the victim after she asked him to stop, when he was close to ejaculating.

The victim reported the abuse to her mother on September 14, 2001, and the district attorney's office was notified less than two weeks later. Defendant was charged with one count of continuous sexual abuse (count 1) and two counts of committing a forcible lewd act on a child under age 14 (counts 2 and 3). Count 1 involved the period from April 15, 2001, through September 24, 2001. Count 2 involved the period from December 15, 2000, through April 14, 2001. Count 3 involved the period from June 1, 2000, through December 14, 2000. Defendant pleaded no contest to counts 1 and 2, and count 3 was dismissed

with a *Harvey*² waiver. The waiver allowed the sentencing judge to "consider [defendant's] prior criminal history and the entire factual background of the case, including any unfiled, dismissed or stricken charges"

B. Sentencing

The trial court announced its tentative decision to impose the middle term for count 1 (continuous sexual abuse) and a full consecutive upper term for count 2 (forcible lewd act). The court later indicated that it intended to apply "all" aggravating factors towards count 2, emphasizing that it was "worried about . . . considering aggravating circumstances twice and . . . concerned by the fact that certain aggravating circumstances on Count 1 are in fact descriptive of the nature of the charge itself."

Defense counsel asked the court to strike parts of the probation report as hearsay that indicated defendant's sister had said defendant sexually abused other family members in the past. The court refused to strike the information but stated it was "not decisive . . . in terms of affecting any sentencing decision." Defense counsel subsequently told the court, "[Y]our Honor, with regard to the sentencing, I'll make it brief, I acknowledge and respect the judge's indication, but the problem here with [defendant] is twofold." Counsel emphasized that defendant had severe addictions to alcohol and pornography.

² *People v. Harvey* (1979) 25 Cal.3d 754.

Counsel disputed the probation officer's assertion that defendant's crimes were numerous and of increasing seriousness and that he committed the "offense" while he was on probation. Counsel stated that the crimes were increasing in number, not seriousness, and they were all alcohol related. Counsel further emphasized that defendant "cooperated early with law enforcement" and "was willing to plead right away" and that he "acknowledged his wrongdoing and expressed his remorse."³ Counsel then submitted the matter.

The trial court explained that it would impose the middle term for continuous sexual abuse (count 1) because the aggravating factors did not outweigh the mitigating factors as to that count. The court then stated, "The offense itself involved a vulnerable child victim, perpetrator is living in the home in a position of trust and confidence." The court further stated that it would impose a full consecutive upper term for count 2 (forcible lewd act).

The court explained, "The two violations involving the same victim were committed at two different times on separate cases [sic] and [a] consecutive term is appropriate either under 1170 or under the alternative sentencing provision. Defendant will be sentenced to the upper term of eight years. [¶] Factors do outweigh those in mitigation. Defendant took advantage of position, victim's mother, [sic] he was the boyfriend living in

³ The probation report similarly suggested defendant had been cooperative and was remorseful.

the home. The victim of her extremely young age [sic] and innocence was particularly vulnerable. Defendant also has two prior felony convictions in his criminal activity, in the Court's view increasing in seriousness. A full consecutive upper term of eight years will be imposed as provided in Penal Code 667.6(c). The crimes were committed on the same victim on separate occasions months apart."

Defense counsel did not object to the court's explanation of its decision.

DISCUSSION

Defendant claims the trial court erred by imposing full consecutive sentences. There are three distinct components to his argument: (1) the mitigating factors warranted a lesser sentence; (2) the trial court used the same aggravating factors to impose the full consecutive term and the upper term for count 2; and (3) the court did not give the mandatory (separate) statements of reasons for its different sentencing choices.

Preliminarily, the People claim defendant waived his claims by failing to object in the trial court. Claims relating to sentences "which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner" are waived on appeal if not first raised in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[W]aiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in

which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*Id.* at p. 353.)

Defendant claims waiver does not apply and notes that his "counsel did articulate objections to the probation report and did point out factors in mitigation that could have justified a lesser sentence." But counsel's argument only relates to the first of defendant's three appellate claims, i.e., that the mitigating factors warranted a lesser sentence. Counsel did not claim the trial court erroneously double-counted aggravating factors or that the court failed to properly explain the required sentencing choices on the record. Accordingly, the latter claims are waived.⁴

⁴ In his reply brief, defendant again emphasizes his counsel's objections to the probation report and further asserts that the trial court relied "on a flawed probation report" We need not address his contention, which was not fully and properly briefed. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [court need not consider claim unsupported by specific legal argument and citation of authority]; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055 [claim raised for first time in reply brief was untimely].) We nevertheless emphasize that the record establishes that defendant's sentence was *not* based on the allegedly objectionable factual information in the report. The trial court did agree with the report that defendant's crimes were of increasing seriousness, rejecting defendant's argument to the contrary on this point. But on appeal, defendant does not directly dispute the trial court's conclusion on this point. In fact, to the extent defendant now questions the aggravating factors the court cited, he failed to preserve the issues for appeal.

With respect to defendant's claim that the mitigating factors warranted a lesser sentence, we shall assume for purposes of argument that trial counsel's argument was sufficient to preserve the issue for appellate review. Defendant's claim is, however, meritless.

Preliminarily, we reject defendant's claim that the trial court did not consider the mitigating factors. In fact, the trial court imposed the middle term for count 1 because "[t]he factors in aggravation do not outweigh those in mitigation as to this particular count." To the extent defendant would have preferred the court to state the mitigating factors on the record, any error is not cognizable since his counsel did not state any objection.

Further, the alleged mitigating factors did not *compel* the trial court to impose a lesser sentence than the particular full consecutive term the court imposed for count 2. The two offenses involved conduct that occurred on separate occasions, and defendant's own admissions reflect a pattern of egregious sexual abuse over a lengthy period of time. In fact, there was ample support for more charges than continuous sexual abuse (requiring three abusive acts over a three-month period) and forcible lewd act (requiring a single abusive act). (See Pen. Code, §§ 288.5, subd. (a), 288, subd. (b)(1)). Under these circumstances, the imposition of a full consecutive sentence was well within the court's discretion.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

RAYE, J.

CALLAHAN, J.